OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 98-4 February 20, 1998

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Impact Analysis for Compliance Cases

In November 1995, we instituted an "Impact Analysis" approach to case management.[1] This model was adopted for a variety of reasons, including recognition of the fact that there was a need to prioritize the use of our scarce resources to most effectively carry out the mission of the Agency.

The Impact Analysis model adopted in 1995 addressed the approach to be taken with respect to the prioritization of C-case investigations and processing, but deferred for further consideration the adoption of specific criteria and goals with respect to the handling of cases at the compliance stage.

The Impact Analysis Compliance Subgroup was established in 1996 for the purpose of developing recommendations to the full Impact Analysis Committee with respect to whether impact analysis should be applied to compliance and, if so, how this should be implemented. After careful consideration of the many aspects of this question, the Subgroup submitted its report, most facets of which were concurred in by the full Impact Analysis Committee. Various other individuals and groups representing Regional interests have also provided valuable comments and suggestions.

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[1] See Memorandum of November 2, 1995, announcing the implementation of the Impact Analysis Program.

APPLICATION OF IMPACT ANALYSIS TO COMPLIANCE WORK

Based upon a thorough consideration of the views presented, I have concluded that it is appropriate to apply the Impact Analysis model to compliance work, as discussed in more detail below.

Because Board Orders and court judgments arise after an adjudication of wrong doing, and after the expenditure of significant resources, there are strong interests, for both the Agency and the public, in obtaining prompt and complete compliance. In an ideal budgetary and staffing environment, I would want compliance cases, by definition, to have comparatively high priority, and would want to allocate sufficient resources to meet this objective. However, in light of current budgetary restraints, I regret that it is not now possible to allocate more resources to compliance. On the other hand, the fact that resources are limited makes it even more critical to establish priorities among pending compliance cases and thereby ensure that the resources now available for compliance are allocated in the best possible manner.

Thus, in implementing Impact Analysis for compliance work, my intent is to not to require any redistribution of resources from other casehandling areas to compliance, but rather to ensure that Regions use their existing compliance resources as effectively and efficiently as possible, and that they are able to make informed judgments about how these resources may best be allocated.

In light of diminished resources, and the fact that the volume of compliance work varies widely among Regions, I realize that some Regions will encounter difficulties in managing their compliance inventory within the applicable time lines set forth herein. With this in mind, we will, whenever possible, utilize the interregional assistance program to aid Regions with their compliance work. In addition, the Contempt Litigation and Compliance Branch will also continue to provide assistance to Regions in this area.

CATEGORIZATION

In the formulation of the Impact Analysis categories for compliance cases, the idea that compliance cases should automatically be accorded the same category as the underlying unfair labor practices was considered, but rejected. Because compliance cases frequently involve unfair labor practices which occurred at a much earlier time, circumstances that originally justified the classification accorded a particular case may

have changed, and new considerations (e.g., partial compliance by a Respondent, assertions of inability to pay, the imminent sale of assets) may now be applicable. For example, a Category III investigation or litigation case may not warrant the same high level of priority by the time the case reaches compliance. On the other hand, a case previously classified as Category II may need to be accorded Category III treatment at the compliance stage, if there is evidence that a Respondent is dissipating or transferring assets.

To a significant extent, the compliance categories defined and adopted herein incorporate the recommendations offered by the Impact Analysis Committee and adopted in the November 1995 Impact Analysis Report. However, several important refinements have been made.

Particularly notable is the decision that, in most circumstances, compliance cases involving employees who desire reinstatement to a viable employer should be classified as Category III.[2] Reinstatement is one of the Act's most important remedial provisions, and high priority should be placed on obtaining a return to work for those discriminatees who so desire. In this regard, the Board has recently adopted a specific policy requiring that offers of reinstatement be made within 14 days of the issuance of the Board's Order. See Care Initiatives, Inc., d/b/a Indian Hills Care Center, 321 NLRB 144 (1996). Thus, this "outcome" must appropriately be viewed as highly important both to the affected individuals and with respect to assuring the overall effectiveness of the Act.[3]

Consistent with Impact Analysis treatment accorded underlying unfair labor practice cases, a three tier categorization system for compliance cases is to be utilized, the specifics of which are set out below. Categorization should occur as soon as possible following the Region's receipt of a Board Order or court judgment. As with investigative categorization, the initial category is subject to change in face of additional evidence.

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[2] However, see footnote 4, below, with respect to salting cases.

[3] A Category III classification is appropriate for reinstatement cases even when a Respondent asserts that an individual is not entitled to reinstatement because the discriminatee otherwise would have been laid off or that circumstances have changed. Such a situation warrants Category III priority even though the ultimate result of the investigation may be that the Region concurs that reinstatement is not required.

As is true of the Impact Analysis model generally, a determination that a particular compliance case warrants a relatively lower priority than another compliance case does not indicate that the matter lacks importance, or that it cannot, or should not, be completed in an expeditious fashion.

Category III Compliance Cases

Category III compliance cases involve the most central provisions under the Act. They include:

A. Cases whose resolution could impact upon the status of a collective-bargaining representative. For example, these would include the following:

- Test of certification cases
- Gissel bargaining orders
- Burns successorship situations
- Withdrawal of recognition cases
- Blocking charges
- Surface bargaining
- Information cases or unilateral changes that imperil the ability to properly bargain

B. Cases whose resolution may affect the employment rights of a large number of individuals, or which involve reinstatement of one or more employees. For example, these would include the following:

- Cases resolving whether a strike is an economic or ULP strike;
- Cases involving whether a strike is protected or unprotected (including 8(g) cases);
- Cases in which discriminatees desire reinstatement to a viable employer (however, see footnote below with respect to "salting cases");[4]

[4] While recognizing that all cases involving unresolved reinstatement requests warrant high priority, it is also recognized that "salting cases" are a separate subset and can often involve large numbers of ongoing organizing campaign, discriminatees. With this in mind, and recognizing the potential resource implications presented by such situations, salting cases involving Section 8(a)(3) reinstatement

- Hiring hall cases involving systemic abuses.

C. Cases in which the alleged misconduct is continuing or repetitive, including:

- Cases involving recidivist violators;
- Cases where backpay or other financial obligation is continuing and there is legitimate concern about the ability of the Respondent to comply with an increasing award;
- Cases in which immediate action is appropriate to avoid dissipation of assets.

D. Cases that revise or refine a legal principle potentially affecting the future rights of undetermined numbers of employees (e.g., if the Board were to issue a decision revising the reinstatement rights and backpay eligibility of undocumented alien workers).

Category II Compliance Cases

Category II compliance cases involve core rights under the Act that would not otherwise be classified as Category III or I.

- Category II will include most 8(a)(3) Orders and Judgments where there is no reinstatement remedy, where the discriminatee or discriminatees no longer desire reinstatement, or where valid offers of reinstatement have been tendered, as well as those 8(a)(5) cases which do not fall in Category III.[5]

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issues may normally be placed in Category II, with the Regions having discretion to elevate them to Category III. The exception would be where there is an ongoing organizing campaign , in which circumstances the case should be placed in Category III. It should also be noted that for any reinstatement case the analysis of whether a Region is meeting the applicable time standard will be based on the Impact Analysis provisions of this memo. While the Board decision in Care Initiatives set forth time lines for Respondents to take certain compliance actions, a Region's performance will be judged only against the Impact Analysis time standards.

[5] Cases involving unlawful 8(a)(5) unilateral changes that affect bargaining or imperil the bargaining relationship would normally be classified as Category III.

For example, the following scenarios would be classified as Category II:

- Bargaining orders requiring negotiations on specific defined subjects, e.g., bargaining over isolated changes in work rules, that do not threaten the continuation of a Union's 9(a) representational status. Included in this group would be narrow 8(a)(5) unilateral change cases that affect groups of employees and which are to be remedied with a return to the status quo ante and a make whole order.
- Remedies involving requests for information that do not affect the course and conduct of bargaining are also considered Category II for compliance purposes.
- 8(b)(1)(A) and 8(b)(2) hiring hall cases where action has been taken to toll the financial liability or where the violation is no longer continuing.

Category I Compliance Cases

Category I compliance cases are those which require only the posting of a notice or which involve only monetary remedies of a very limited nature. As noted above, cases involving other remedial requirements (i.e., substantial amounts of backpay, reinstatement rights, bargaining obligations, dues reimbursement, etc.) will be categorized either as Category II or Category III.

Category I would **exclude** cases which:

a. Impact upon organizing or bargaining activities;
b. Involve the undermining of the representational status of a collective-bargaining representative; or
c. Involve Respondents with a significant recidivist history.

A determination of what constitutes "monetary remedies of a very limited nature" will, of course, depend on a case-by-case analysis; however, among the criteria that should be considered are the amount of money involved and the number of persons or parties entitled to share in the monetary award. It is anticipated that a backpay case classified as Category I would normally involve only a single individual or a very limited number of affected persons, and a monetary remedy of less than $2,500 for an individual, or an aggregate remedy of $5,000 or less.

GUIDELINES FOR APPLYING IMPACT ANALYSIS WHERE A RESPONDENT HAS FILED FOR BANKRUPTCY

Compliance cases involving bankruptcy have often been automatically accorded a lower priority than might otherwise have been appropriate. In an effort to address this problem, guidelines have been adopted with the intent of insuring that such cases are accorded the correct priority based upon the particular circumstances of each case. A detailed explication of these guidelines has previously been provided. See Memorandum OM 97-60 (September 10, 1997) – "Guidelines for Applying Impact Analysis Where a Respondent Has Filed for Bankruptcy."

As a general rule, the filing of a bankruptcy petition in a pending unfair labor practice case requires that high priority be given to promptly analyzing the elements of the potential remedies involved (e.g., backpay, reinstatement, bargaining order, etc.), and the likelihood of obtaining meaningful relief through, or following the conclusion of, the bankruptcy case. (See Compliance Manual 10610, et seq.). If there appears to be a reasonable possibility of obtaining compliance with a bargaining order or reinstatement obligations (for example, in a Chapter 11 reorganization case), or of securing payment of a significant amount of backpay, the case should be classified as Category III, at least until such time as the Region has taken all appropriate steps to protect the Board's interests.[6]

Accordingly, Regional analysis regarding the classification of cases in which bankruptcy petitions have been filed will normally consider at least the following factors:

1. The type and stage of the bankruptcy proceedings.
2. The amount of money at stake and the probability of a distribution
   from the bankruptcy estate, or of obtaining post-bankruptcy compliance.
3. The stage of the Board's proceedings.
4. The priority of the Board's claim.

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[6] If the Region determines, following any necessary investigation, that it is unlikely that a meaningful remedy can be obtained, the case should be reclassified as Category I or II, as applicable, after taking all appropriate steps to protect the Board's interests in the bankruptcy case.

Reports regarding overage bankruptcy cases must provide sufficient information to establish that the provisions of OM 97-60 are being followed.

COMPLIANCE TIME LINES

The prior system, in essence, provided a target for the completion of compliance actions in all cases within 80 days. In recognition of the increased complexity and diversity of Regional compliance casework, the time targets for most types of compliance cases will be extended, as set forth below. In establishing these time targets, as well as the "interim time goals" discussed below, cognizance has been taken of the recent decision in Care Initiatives, Inc., d/b/a Indian Hills Care Center, 321 NLRB 144 (1996), in which the Board established specific time lines for Respondents to effectuate particular compliance actions. The adoption of 4 week intervals between categories is intended to parallel the system previously instituted with respect to underlying C-case investigations.

Regions are to complete compliance actions, with the exception of completing the posting period, within the following numbers of days from receipt of the Board Order or court judgment:[7]

Category III	**91 days**
Category II	**119 days**
Category I	**147 days**

The above standards apply to all compliance cases, including those which result in a Regional determination that further proceedings are not warranted. In the latter cases, Regions should either close the case or issue a compliance determination within the requisite time period.

Interim Time Goals

In light of Care Initiatives, and in recognition of the need for prompt categorization of compliance work, the following interim time goals will apply with respect to compliance cases. It should be emphasized that these are goals and not time standards by which the Regions will be measured or evaluated. All dates are from receipt of a Board Order or court judgment:

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[7] The current "end of month" approach will continue to apply, i.e., a case will not be deemed overage until the end of the month in which the 91st, 119th, or 147th day occurs.

Day 7 - The compliance case will be given an impact analysis category (as noted elsewhere, this initial categorization is based upon what is known at the time and is subject to change in face of future developments).

Day 14 - Per Care Initiatives, the Respondent is (where applicable) to offer reinstatement and expunge records.

Day 14 - Regions will normally have sent the initial compliance letter, therein seeking payroll information and transmitting notices for posting. The Certification of Compliance would presumably be part of this package.

Day 28 - Per Care Initiatives, notices are to have been posted and payroll information supplied (i.e., within 14 days of the Region's initial letter).

Day 35 - Certification of Compliance forms due (i.e., within 21 days of the Region's initial letter).

Recommendations for Enforcement or Contempt

Where compliance is not obtained, Regions are to make the appropriate submissions to Enforcement or Contempt within the applicable time period for the relevant category, as set forth above.

However, in cases where the Respondent demonstrates a clear failure or refusal to comply, regardless of category, it is expected that recommendations for enforcement (or in post-judgment cases, recommendations for contempt) should be submitted as soon as possible, and normally within 49 days, of receipt of the Board Order or court judgment.[8]

Additionally, even if partial compliance has been achieved with other remedial provisions of an Order, the above expectation will normally apply where a Respondent has failed to comply with a bargaining order,[9] or has failed to make appropriate offers of

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[8] As in the past, Regions are encouraged to consult telephonically with Contempt as to whether there is sufficient factual and legal basis for contempt prior to preparing a submission.

[9] It is not anticipated that compliance will be obtained with all bargaining order remedies within this 49 day period. Rather, appropriate steps toward compliance must be undertaken within this period. For example, in test of certification or withdrawal of recognition cases, it is expected that within this period respondents

reinstatement within the Care Initiatives time frame, despite having the apparent ability to do so.

PERFORMANCE STANDARDS

The current performance standard for timeliness of Regional compliance activity, i.e., that the number of unexcused overage cases not exceed 10 percent of a Region's total inventory of pending compliance cases, shall, for the present, remain in effect. Regions will be evaluated by this standard for FY 98, while the transition to Impact Analysis proceeds.

However, data will also be calculated and provided to the Regions with respect to their overage experience for each Impact Analysis category pursuant to the new 91-119-147 day standards. This latter information should prove helpful in managing compliance work, and in evaluating the experience this year under Impact Analysis. A determination as to performance standards for FY 99 will await this evaluation, including an assessment of the concern that some of you have raised about the impact of placing reinstatement issues in Category III. As noted below under Implementation, field input will be solicited and carefully considered before any changes are made in performance standards.

The Performance Measurement Subcommittee of the Compliance Reinvention Committee continues to review various aspects of the current program for evaluating Regional compliance performance, including the question of what steps are necessary to comply with the Government Performance and Results Act (GPRA). As part of this overall review, the Subcommittee has been examining the current system for reporting compliance cases and for requesting excused status. No changes are being made in the current standards for excusing cases. However, Memorandum OM 98-13, issuing today, provides further guidance as to how the current reporting system is to be implemented. Please note also that, as discussed above in the bankruptcy section of this memo, reports on regarding overage bankruptcy cases must provide sufficient information to establish that the provisions of OM 97-60 are being followed.

IMPLEMENTATION

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will have posted the notice and returned the certification of compliance as required under Care Initiatives, and that negotiations will have commenced, if a timely demand for bargaining has been made.

Impact Analysis with respect to compliance cases shall be instituted for all Regions as of March 1, 1998. While consideration was given to a suggestion that we implement this program on an experimental basis in a small number of Regions, I believe it preferable to have all Regions begin the program at the same time, keeping in mind that we will be closely assessing the experience under Impact Analysis during the balance of FY 98. Having experience from all Regions is critical to this assessment.

The above experience will be important to us in determining whether to make modifications in the program and in determining later this Fiscal Year what performance standards will apply for FY 99. Input from the field will be solicited and carefully considered before any changes are made in the program or in performance standards. We anticipate that this review will take place in the summer of 1998.

As of March 1, 1998 Regions should categorize new compliance cases promptly following receipt of a Board Order or court judgment, and also proceed to categorize their existing compliance inventory as soon as possible pursuant to the instructions in Memorandum OM 98-13, issuing today. The overage compliance report for March (i.e., the one that is submitted in early April) should reflect this categorization.

If you have questions about this memorandum, please contact your Assistant General Counsel, Deputy AGC, or DAGC Dana Hesse or Shelley Korch. We are planning also to have a series of conference calls, by District, in the near future to discuss any questions or issues which may be arising as you implement this program.

CONCLUSION

I hope that you will find Impact Analysis to be helpful in managing your compliance work. It should be emphasized that as with any new program we will be assessing our experience and making necessary adjustments as time goes on. Your input in this area will be highly valuable.

F. F.

cc: NLRBU